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December 20, 2013

Russell B. Selman
Schiff Hardin LLP
233 South Wacker Street, Ste. 6600
Chicago, Illinois 60606

Re: Flushing Tunnel Activation

Dear Mr. Selman:

I write in response to National Grid's request for DEP to delay reactivation of the flushing tunnel - a project that, as you are well aware, has been under construction for the past three years, has been approved by the New York State Department of Environmental Conservation ("DEC") under the Clean Water Act ("CWA"), is supported by the United States Environmental Protection Agency ("EPA"), and will, most importantly, provide tremendous benefits to both the current conditions of the Canal and the surrounding community. In addition to being misguided, your request is also untimely and moot. After receiving approvals for the flushing tunnel's start-up plan from both DEC and EPA, which included approvals of DEP's procedures and equipment for controlling and monitoring turbidity, the first of the tunnel's three upgraded pumps was reactivated on December 18.

Your claim that commencement of this long-awaited, publicly vetted CWA project constitutes spoliation of evidence is entirely baseless. First, Grid sampled sediments in the Canal in 2006 and 2007 when the former flushing tunnel was active. Grid relied on these samples extensively in its comments to EPA's Remedial Investigation, Feasibility Study and Proposed Plan. Accordingly, Grid has no basis to argue that it will be prejudiced by having to sample sediments in 2013 or later when the flushing tunnel is active, because Grid already relies on samples it took when the flushing tunnel was active in 2006 and 2007.

Second, Grid has been aware of the approximate timing of the tunnel's reactivation for years, and has had since 2010 (when the flushing tunnel was deactivated for the upgrade project) to collect samples in the Canal. As your letter indicates, Grid in fact has

already expended \$17 million dollars on exactly such sampling activities, and the EPA, as part of its efforts to characterize the site over the past three years, has expended in excess of \$13 million. Furthermore, DEP has undertaken sampling of canal sediments. Thus, numerous data sets for this time period already exist and neither Grid nor any other PRP have in any way been prejudiced by the long-awaited and long-anticipated reactivation of the tunnel.

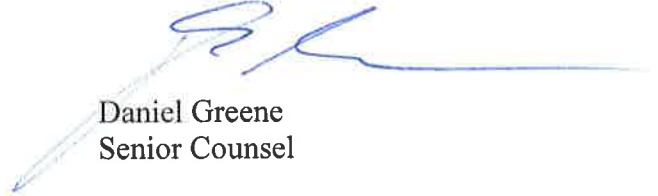
Third, your letter indicates that Grid's remedial design work will be made more difficult if it occurs when the tunnel is on. Grid's desire to perform its design work with the tunnel turned off is inconsistent with both the past, and long-known, future conditions of the Canal. Indeed, the flushing tunnel was constructed in 1911, ran until 1960, and then was again reactivated by the City in 1999. It was then shut down by the City in 2010 only in order to perform this current State-approved upgrade project, which pre-dated the Superfund designation. It was always understood by the stakeholders that the future conditions of the Canal would include a newly upgraded and re-activated flushing tunnel that would be turned on long before the commencement of the Superfund remediation. Indeed, EPA's draft EPA/NYSDEC/DEP Gowanus Canal MGP and CSO Cleanup Coordination Schedule – which has been posted on its website since December 2011 – indicated that the tunnel project would be completed by 2013 and would take place prior to the remedial design work.¹ Your desire to delay reactivation of the tunnel, ostensibly to collect samples and perform remedial design work, serves no reasonable technical purpose. Indeed, Grid made similar arguments in its comments to the Proposed Plan, and EPA rejected Grid's assertions in its Responsive Summary.

Finally, the City strongly objects to your baseless assertion that the City's completion of a State-approved CWA upgrade project should warrant "the benefits of adverse inferences against the City" in a future legal proceeding. Again, Grid in fact already sampled within the Canal with the flushing tunnel was active in 2007, and had from 2010 through 2013 to conduct sampling activities in the Canal with the tunnel turned off, and most certainly took advantage of that opportunity. National Grid's belated request that the City should delay an approved CWA upgrade project so that Grid can sample the Canal in any condition that it deems fit is meritless and does not in any way support Grid's assertion that the reactivation of the tunnel merits an "adverse inference." The City would strongly oppose any attempt by Grid or any other party to seek an adverse inference against the City for, in effect, improving water quality in the Canal.

¹ Note that the updated schedule – released in September 2013 – indicates that the project will be completed in 2013/14, and again will either be concurrent with or prior to the remedial design work. Thus, Grid has no reasonable basis for asserting that the tunnel should be deactivated for purposes of the design. Note also that EPA states expressly in the Record of Decision that EPA is committed to ensuring that the City's work under the LTCP process, including the re-activation of the flushing tunnel, are coordinated with the Superfund remedial process.

In closing, Grid had more than ample opportunity to sample the Canal during the three year period when the tunnel was offline, and the City will not permit Grid or any other PRP engage in tactics that will further delay the benefits of this CWA project for the Gowanus community.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'DG', with a long horizontal line extending to the right.

Daniel Greene
Senior Counsel

cc: Brian Carr, USEPA